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**Supreme Court of the United States**

ROBAK, J.

October Term, 1973

No. 73-846

**JOHN W. WINGO, WARDEN KENTUCKY STATE PENITENTIARY EDDYVILLE, KENTUCKY,**

*Petitioner,*

*vs.*

**CARL JAMES WEDDING,**

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals  
for the Sixth Circuit**

**BRIEF OF AMICUS CURIAE IN SUPPORT  
OF RESPONDENT**

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**BRIEF OF AMICUS CURIAE IN SUPPORT  
OF RESPONDENT**

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**Interest of Amicus Curiae**

In this habeas corpus case an evidentiary hearing was conducted by a United States Magistrate pursuant to a local district court rule purportedly adopted under the authority of the Federal Magistrates Act of 1968. This Court has undertaken to determine whether the conducting of the hearing by the magistrate was authorized by the Federal Magistrates Act and by the United States Constitution.

Federal habeas corpus statutes confer upon single district judges what amounts to the power to set aside

decisions of state trial courts which in many instances may have been affirmed in the intermediate and highest state appellate courts. In California the district judges have in a number of cases delegated the duty of conducting evidentiary hearings to United States Magistrates pursuant to local orders similar to the rules adopted by the district court in the instant case. In view of the extraordinary powers conferred upon the federal district courts in habeas corpus matters, the State of California has a special interest in ensuring that all relevant determinations of fact and law, including the findings which are the result of an evidentiary hearing, be made by the district judge who is responsible for making the ultimate decision in the case. This interest brings the State of California before this Honorable Court as *amicus curiae*.

### Summary of Argument

Article III of the United States Constitution, which vests the judicial power of the United States in the Supreme Court and inferior courts established by Congress, contains the implicit requirement that judges who are charged with the exercise of the judicial function will themselves conduct all proceedings necessary for a proper determination of each case. The assignment to United States Magistrates of the duty to conduct evidentiary hearings in habeas corpus matters deprives the parties of the right to be heard before the ultimate trier of fact and therefore constitutes an improper delegation of the exercise of the judicial function in violation of the spirit of Article III.

The use of United States Magistrates to conduct evidentiary hearings in habeas corpus matters is also prohibited by the Federal Habeas Corpus Act which expressly requires that such hearings be conducted by the district judge. The Federal Magistrates Act effected no change in this requirement. Rather the express language and legislative history of the Act indicate the clear intent of the Congress that the role of magistrates in habeas corpus matters be limited to giving assistance to the district judges in the determination of whether an evidentiary hearing should be conducted.



## ARGUMENT

### **Evidentiary Hearings on Habeas Corpus Petitions Are Required to Be Conducted Before Judges Who Have Been Duly Appointed Under Article III of the Constitution**

#### **A. The Constitution Requires That Evidentiary Hearings in Habeas Corpus Matters Be Conducted by the Judge Who Is Empowered Under Article III to Exercise the Judicial Powers of the United States**

Federal district judges, who are empowered by Article III of the Constitution to exercise the judicial power of the United States, are not authorized under Article III to delegate their fact finding duties to United States Magistrates in habeas corpus matters.

This Court has long recognized the general right of parties to a law suit to have relevant issues of fact considered and determined by the ultimate finder of facts. In *La Buy v. Howes Leather Company*, 352 U.S. 249, 256 (1957), this Court held that an improper reference of a case to a special master in violation of Rule 53(b) of the Federal Rules of Civil Procedure "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation." The decision in *La Buy*, *supra*, was based on the Court's interpretation of Rule 53 and did not specifically rely on the prescriptions of Article III. However, the Court's restrictive construction of Rule 53 as not permitting a reference to a master even in a case containing complicated issues and arising at a time when the court was faced with a congested calendar indicates, along with above-quoted language, this Court's

concern that parties to an action be heard before the judge who is charged with making the ultimate decision.

In habeas corpus matters, an evidentiary hearing need not be conducted where the application and return present only issues of law. 28 U.S.C. §2243. Thus in a case where an evidentiary hearing is ordered and conducted, the issues of fact to be determined are a vital and often conclusive part of the proceedings. *Payne v. Wingo*, 442 F. 2d 1193, 1194-95 (6th Cir. 1971).

This Court acknowledged in *Holiday v. Johnston*, 313 U.S. 342, 351-52 (1941), that the weighing and appraising of testimony was an essential element in the determination of the crucial facts in a habeas corpus matter, and that an appraisal of the truth of a prisoner's oral testimony by a master or commissioner was not, in light of the purpose of the evidentiary hearing, the equivalent of the judge's own exercise of the function of the trier of facts.

The use of a magistrate to conduct an evidentiary hearing deprives the parties of their right to have the district judge, who is the ultimate finder of facts, consider the demeanor of witnesses for purposes of determining their credibility. Since the determination as to a witness' credibility is often crucial to the ultimate decision habeas corpus case, it is submitted that the delegation to United States Magistrates of the duty to conduct evidentiary hearings and to make recommendations as to findings of fact has the effect of depriving the district judge of a means by which he can fairly determine the facts. Accordingly, such a delegation is invalid under Article III.

*Amicus* recognizes that while the courts have not expressly held that the assignment of magistrates to conduct evidentiary hearings violates Article III, it is noteworthy that a number of courts have expressed concern about the possible unconstitutionality of a magistrate's undertaking duties which should be reversed for an Article III judge.

In *Reed v. Board of Election Commissioners of City of Cambridge*, 459 F. 2d 121, 123 (1st Cir. 1972), the Court held a decision made by a magistrate without notice and without opportunity granted petitioner to be heard by a judge was a "laying on hands" and an "abnegation of judicial authority by the court entirely contrary to the provisions of Article III." Moreover in *Rainha v. Cassidy*, 454 F. 2d 207, 208 (1st Cir. 1972), the court stated that it found unappealing "the thought that the magistrate, rather than recommending a hearing after a preliminary review, could be empowered to conduct the evidentiary hearing himself and make findings of fact, to be approved by a pro forma laying on of hands . . . ." From the foregoing it is submitted that United States Magistrates may not properly be assigned the duty to conduct evidentiary hearings under Article III of the Constitution.

*Amicus* further submits that the use of United States Magistrates to conduct evidentiary hearings is improper under Article III for the additional reason that unlike the district judge, who is appointed during good behavior under the provisions of Article III, a United States Magistrate is appointed by the district court and serves for a term of only eight years. 28 U.S.C. §631. Because a United States Magistrate depends for his reappointment on the decision of the district court judge or judges who have the duty to review his decisions, the magis-

trate lacks the independence and authority requisite to a determination of the serious questions presented in habeas corpus cases.

It should be noted that the gravity of federal habeas corpus proceedings does not stem exclusively from the rights of prisoners which may be at stake. Federal habeas corpus cases involving state prisoners present serious questions because under the federal habeas corpus statutes, 28 U.S.C. §§2241 *et seq.*, a single district judge is conferred with what amounts to the power to set aside the judgment of a trial judge even after affirmance by the highest appellate court in the State. *Amicus* submits that the extraordinary power conferred on the federal district courts entitles the State to a hearing by a judge who has been duly appointed under Article III of the Constitution.

**B. The Federal Habeas Corpus Statutes, Require That Evidentiary Hearings in Habeas Corpus Matters Be Conducted by District Court Judges**

United States Magistrates are not authorized under the federal habeas corpus statutes to conduct evidentiary hearings. The question of the authority of district judges to delegate to commissioners the power to conduct evidentiary hearing was considered in *Holiday v. Johnson*, 313 U.S. 342, 350-54 (1941) wherein this Court held that United States commissioners were not empowered under then existing habeas corpus statutes to conduct evidentiary hearings. 28 U.S.C. 1940 ed.; §§ 457, 458, 461; Act of Feb. 5, 1865, ch. 20, §1, (14 Stat. 385-86). At the time of the *Holiday* decision, section 457 of Title 28 directed that "The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true

cause of the detention of such party;" section 458 required that "The person making the return shall at the same time bring the body of the party before the *Judge* who granted the writ;" and section 461 required that "The *court, or justice, or judge* shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments and thereupon to dispose of the party as law and justice require." [Emphasis added.]

Similar language regarding the duties of a "court, justice or judge" in habeas corpus proceedings is contained in 28 U.S.C. § 2243, the successor statute to the provisions which *Holiday v. Johnston* held to have required that the district judge himself conduct evidentiary hearings in habeas corpus matters. The Court may not presume that Congress was unaware of the legislative history and judicial interpretation of the habeas corpus statutes when it retained the language of the former habeas corpus statutes in a subsequent statute *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 106-07 (1941). The court in *Payne v. Wingo*, 442 F.2d 1192, 1194-95 (6th Cir. 1971), has recently applied the reasoning of *Holiday v. Johnston* to section 2243 and has ruled that a United States Commissioner, acting as a special master, is not authorized to conduct a habeas corpus evidentiary hearing. Noting that the language in the habeas corpus statutes construed in *Holiday v. Johnston*, *supra*, had been retained in section 2243, the Court in *Payne* held:

"... Without a clear mandate from Congress, we cannot presume that that body would entrust a vital and often conclusive part of habeas corpus to an official, like a Special Master, who lacks the independence and authority of the federal judiciary."

*Payne v. Wingo*, *supra*, at 1194-95.

*Amicus* submits from the foregoing that the federal habeas corpus statutes, as interpreted by the courts, require that the federal judges themselves conduct evidentiary hearings in habeas corpus matters. The passage of the Federal Magistrates Act, 28 U.S.C. §§ 631 *et seq.*, in 1968 did nothing to alter the requirement of the habeas corpus statutes.

Magistrates are not authorized to conduct evidentiary hearings under 28 U.S.C. section 636(a)(1), which grants to United States Magistrates the powers formerly enjoyed by United States Commissioners. None of the former powers of United States Commissioners authorized them to perform such a judicial function. In *Holiday v. Johnston, supra*, this Court specifically determined that commissioners were not authorized to conduct evidentiary hearings. *See also Payne v. Wingo, supra.*

Petitioner contends that the conducting of habeas corpus evidentiary hearings by United States Magistrates is authorized under 28 U.S.C. §636(b), which provides that Magistrates may be assigned additional duties which are not inconsistent with the Constitution or laws of the United States. *Amicus* submits that since federal habeas corpus statutes expressly require that a district judge conduct habeas corpus evidentiary hearings, the assignment to a magistrate of the duty to conduct such a hearing would be "inconsistent with the laws of the United States" and therefore unauthorized under 28 U.S.C. section 636(b).

**C. The Use of United States Magistrates to Conduct Evidentiary Hearings Is Contrary to the Legislative Intent of Congress**

The legislative history of the Federal Magistrates Act of 1968 demonstrates conclusively that the Congress had no intention of authorizing the holding of evidentiary hearings by magistrates. In 1966, a proposed Federal Magistrates Act, Senate Bill 3475, included a proposed section 636(b), Title 28, which contained the following language:

"Any district court of the United States may assign to any United States magistrate appointed by that court the discharge within the territorial jurisdiction prescribed by his appointment of such additional powers or duties as are not inconsistent with the Constitution and laws of the United States. Such additional powers and duties may include, but are not restricted to—

"(1) service as a special master in an appropriate civil action;

"(2) supervision of the conduct of any pretrial discovery proceeding in a civil or criminal action; and

"(3) preliminary consideration of applications for post-trial relief made by individuals convicted of criminal offenses." S. 3475, 89th Cong. 2d Sess. § 636(b), (1966), *quoted in Hearings on Federal Magistrates Act, S. 3475, 89th Cong. 2d Sess. and S. 945, 90th Cong. 1st Sess. Before the Subcomm. on Improvements on Judicial Machinery of the Senate Comm. on the Judiciary at 20-21 (1966-67).*



In its report filed on the bill the Judicial Conference Committee on the Administration of Criminal Law expressed its concern that the enumeration of duties in the proposed section 636(b) of the bill constituted a delegation of authority which was so broad in scope as to make the subsection vulnerable to possible constitutional attack. *Hearings on the Federal Magistrates Act, supra* at 241j, 241n; *see also TPO, Inc. v. McMillen*, 460 F.2d 348, 355-59 (7th Cir. 1972).

In 1967, a revised bill, which was ultimately adopted as the Federal Magistrates Act, was introduced in the Senate as S. 945. Although S. 945 retained certain enumerated duties in section 636(b) which could be assigned to magistrates, such duties were qualified and limited so as to avoid the constitutional problems raised in its predecessor bill.

Under the revised Section 636(b), contained in Senate Bill 945, "service as a special master" in subsection one of section 636(b) in S. 3475 was expressly made subject to the Federal Rules of Civil Procedure which include the highly restrictive Rule 53. In subsection two, "supervision of the conduct" of pretrial or discovery was reduced to "assistance to a district judge." In subsection three "preliminary consideration of applications for post-trial relief" in the prior bill was reduced to "preliminary review" leading to "submission of a report and recommendations to facilitate the decision of the district judge" as to "whether there should be a hearing." *TPO, Inc. v. McMillen, supra*, 460 F. 2d at 357.

In its report on S. 945, the Judicial Conference Committee on the Administration of Criminal Law



made the following comments on the revised section 636(b)(3):

"The attached draft bill further includes among powers and duties which may be assigned to magistrates (section 636(b)(3)), 'preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendation to facilitate the decision of the district judge having jurisdiction over the case.' The Committee approves this version subject to the addition of the phrase after the word 'case'—'as to whether there should be a hearing.'

"This will make it clear that *it is the judge's responsibility to make the ultimate decisions and to hold hearings on such applications, rather than that of the magistrate.* [Emphasis added.] The earlier version in S. 3475, which the Committee deemed unacceptable, had permitted a possibly broader delegation to magistrates of the power of 'preliminary consideration of applications for post-trial relief made by individuals convicted of criminal offenses.'" *Hearings on the Federal Magistrates Act, supra* at 245.

In reporting S. 945 to the Senate, the Judiciary Committee was careful to characterize the provisions of section 636(b) in most restrictive terms. The report expressed its concern regarding unwitting delegations to magistrates of duties more properly discharged by judges and emphasized that the additional duties assignable to magistrates under section 636(b) would be limited to those which were consistent with the Constitution and laws of the United States. S. Rep. No.

371, 90th Cong. 2d Sess. 25-27 (1967), quoted in *TPO, Inc. v. McMillen*, *supra*, 460 F. 2d at 357-58.

The report of the Judiciary Committee as to section 636(b)(1), indicated that the magistrates' authority to serve as special masters was governed (1) by Rule 53(b) of the Federal Rules of Civil Procedure, which limits the use of masters to exceptional cases, and (2) by the rule of *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957), which prohibits any use of special masters which would result in the abdication of the decision making responsibility properly belonging to the district court. As to section 636(b)(2), the Committee emphasized that unlike its predecessor bill, magistrates in the area of post conviction relief, could undertake duties such as were previously handled by law clerks. The Committee reported:

"... A qualified, experienced magistrate will, it is hoped, acquire an expertise in examining these applications and summarizing their important contents for the district judge, thereby facilitating his decisions. Law clerks are presently charged with this responsibility by many judges, but judges have noted that the normal 1-year clerkship does not afford law clerks the time of experience necessary to attain real efficiency in handling such applications." *S. Rep. No. 371, supra*, quoted in *TPO, Inc. v. McMillen, supra* at 358.

*Amicus curiae* submits that the legislative history of the Federal Magistrates Act as set forth above, makes clear the intent of Congress that district judges rather than magistrates should conduct evidentiary hearings in habeas corpus matters. Not only did the appropriate

subcommittee of the Judiciary Committee reject provisions of former proposed sections which might have authorized magistrates to conduct hearings, but the final report of the Judiciary Committee to the Senate indicated that the duties of magistrates in post-conviction matters would be similar to those theretofore performed by clerks of the court.

In view of the foregoing legislative history, it is submitted that the Sixth Circuit properly applied the *ejusdem generis* principle of statutory construction to section 636(b)(3), and correctly determined the authority of magistrates in post-conviction matters to be limited to a "preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing." 28 U.S.C. § 636(b)(3); *Wedding v. Wingo*, *supra*, 483 F. 2d at 1132-33.

### Conclusion

Under Article III of the Constitution the parties to a habeas corpus proceeding are entitled to have their case heard by the district judge who is charged with the ultimate decision making. The Federal Habeas Corpus Act expressly requires that the judge himself conduct evidentiary hearings in habeas corpus matters. The Federal Magistrates Act follows the requirements expressed in the Habeas Corpus Act. The Act contains no express provision for the holding of evidentiary hearings by United States Magistrates. The language and history of the Act indicate, to the contrary, that United States Magistrates are not authorized to conduct evidentiary hearings in habeas corpus cases.

For the foregoing reasons, the State of California as *Amicus Curiae* joins Carl James Wedding in urging that the decision of the Sixth Circuit be affirmed.

Respectfully submitted,

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